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No.

IN THE

Supreme Court of the United States

October Term, 1983

JOHNSON CITY CENTRAL SCHOOL DISTRICT and CASPER ROHLAND,

Petitioners,

against

BARBARA QUACKENBUSH, for herself and on behalf of her infant son, JASON GAMBEE,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Dated: November 18, 1983

Questions Presented.

1. Whether 42 U.S.C. Section 1983 can be used as the basis for diverting monies from educational institutions to pay tort damages and attorneys' fees in cases involving the classification and placement of handicapped students.

2. Whether the decision of the Court below conflicts with the decision of the Seventh Circuit Court of Appeals in *Anderson v. Thompson,* 658 F.2d 1205 (1981), where such decision held that a claim can be asserted under 42 U.S.C. 1983 when an allegation has been made that there has been a denial of the procedural safeguard rights provided under the Education for All Handicapped Act (P.L. 94-142).

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CONSTITUTIONAL PROVISION:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984.

No. .

JOHNSON CITY CENTRAL SCHOOL DISTRICT and CASPER ROHLAND,

Petitioners,

against

BARBARA QUACKENBUSH, for herself and on behalf of her infant son, JASON GAMBEE,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for a Writ of Certiorari.

The petitioners, Johnson City Central School District and Casper Rohland (referred to in the complaint as "Rowlind"), pray that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered in the Clerk's Office on August 24, 1983.

Opinions Below.

The opinion of the Court of Appeals is unreported as yet and is reproduced as Appendix A to this petition (PA 1).* The opinion of the United States District Court for the Northern District of New York which was affirmed is not reported and is reproduced as Appendix B (PA 26).

Jurisdiction.

Jurisdiction is conferred on this Court by 28 USC 1254.

The decision of the Court of Appeals sought to be reviewed was filed on August 24, 1983.

Constitutional and Statutory Provisions Involved.

This case involves the Education for All Handicapped Act, 20 U.S.C. §1400 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.*, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. The pertinent parts of these statutes are set forth as Appendix C (PA 34).

Statement of the Case.

A review of the judgment of the Circuit Court is sought by this petition. In the District Court, violations of the Education for All Handicapped Act ("EHA"), 20 U.S.C. §1401 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Due Process and Equal Protection Clauses to the United States Constitution were alleged. Jurisdic-

*PA refers to the petitioners' appendix to this petition.

tion was asserted under 20 U.S.C. §1415(e) and 28 U.S.C. §§ 1331(a), 1343(a)(3) and (4). As noted in the District Court decision, the gravamen of the case is that the petitioners failed to classify the student as a handicapped child with a learning disability, and failed to provide supportive services for him (PA 26).

Statement of Facts.

Respondent alleges in her complaint that her son had been placed in a regular kindergarten class in the School District in September, 1978. She asserts that the School District knew or should have known that her son was a handicapped child in need of special educational services. Respondent alleges that she took no action at the time her son was placed in the regular kindergarten class because School District employees had told her to wait until the following year. At the end of that school year, respondent's son repeated kindergarten, again in a regular classroom setting (PA 3-4).

Respondent further alleges that she had had her son evaluated by a psychologist because of a concern about his lack of progress in the second year. The psychologist recommended that her son be classified as learning disabled. A copy of the psychologist's evaluation was sent to the School District's Committee on the Handicapped (COH) in April, 1980. Respondent alleges that in June, 1980, she requested that her son be reviewed by the COH, and that petitioner Rohland came to her home with a "parental permission form." Petitioner Rohland was the Chairperson of the COH.

Respondent asserts that she filled in the "parental permission form" on instructions of petitioner Rohland and

that she left blank the area to be checked with respect to giving permission to conduct an evaluation of her son. She further claims that Rohland took the form and that it was not until some time thereafter that she learned that the form had been altered. She alleges that petitioner Rohland had altered the form "for the sole purpose of denying [Jason] the special education he is entitled to" (PA 4).

Respondent claims that the School District took no action on her request, allegedly because of petitioner Rohland's act of putting a checkmark on the form in the box indicating that she denied the School District permission to conduct an evaluation. She claims that petitioner Rohland acted pursuant to a policy of the School District to refuse special education to handicapped children for financial reasons. The petitioners have denied these allegations.

Respondent asserts that her son was denied the special education to which he was entitled, suffered damages to his intellect, emotional capacity, and personality, and was impeded in acquiring necessary training. She also alleges that she moved to a different school district to get the services which her son needed, and that she herself suffered emotional distress (PA 4). She seeks compensatory damages both for herself and her son, as well as punitive damages against petitioner Rohland.

Petitioners moved in the District Court to dismiss the complaint on the basis that respondent's claim did not state a claim under 42 U.S.C. §1983, that respondent failed to exhaust her administrative remedies, and that the EHA provided exclusive administrative remedies which plaintiff could not circumvent either by moving to another school district or by asserting her claims under 42 U.S.C.

§1983. The District Court denied the motion, and subsequently certified certain questions for the Circuit Court's determination pursuant to 28 U.S.C. §1292(b).

In its decision affirming the District Court, the Circuit Court held that the judicial review contemplated by §1415(e)(2) of the EHA was the exclusive means for reviewing a final administrative decision under the EHA (PA 13). The Circuit Court further stated that such a view, however, did not dispose of the appeal because the judicial review provided by §1415(e)(2) was not available in the circumstances alleged by the respondent. The Circuit Court found that the respondent had not proceeded through the administrative stages provided by the EHA allegedly because the School District had deprived her of the opportunity to take advantage of the procedural safeguards offered by the EHA (PA 13). The Circuit Court further stated that its conclusion affirming the District Court decision below was "consistent with the result in *Anderson v. Thompson,* 658 F.2d 1205 (7th Cir. 1981), which held that the remedy under §1415(e)(2) excluded and was inconsistent with §1983 relief" (PA 17). It is that decision which is the subject of this petition for a writ of certiorari.

Reasons for Granting the Writ.

The Circuit Court's determination that a Section 1983 claim is involved is erroneous, in conflict with the Seventh Circuit decision in *Anderson v. Thompson,* contrary to Congress' intent in promulgating the EHA, and likely to divert funds away from both handicapped and non-handicapped students.

All three Judges in the Circuit Court opinion had no difficulty in concluding that the EHA is the exclusive means

for reviewing a final administrative decision pertaining to a complaint involving a student who is handicapped or one who is thought to possess a handicapping condition (PA 13, 18). Indeed, the majority of the Court went on to state that its conclusion was consistent with the result in *Anderson v. Thompson* "which held that the remedy under §1415(e)(2) excluded and was inconsistent with §1983 relief" (PA 17). Nevertheless, the majority proceeded to carve out an exception to its finding that the EHA provided an exclusive remedy for such complaints by stating that, because of the allegation that the respondent had been denied her procedural safeguard rights under the EHA, the claim involved was not one under the EHA but rather one under 42 U.S.C. §1983. Such an exception was never intended by Congress when it passed the EHA, and it is likely to create unintended results by diverting funds away from the education of the handicapped into payment of tort claims and attorneys' fees in cases involving alleged misclassification, inappropriate placement, or both.

Circuit Court Judge Weis* in his dissenting opinion states well the reasons why the majority's opinion was erroneous:

> "I do not agree that there has been a deprivation in this case such as to justify the application of Section 1983. No action taken by Rowlind nor any school district policy identified by plaintiff prevented her use of the administrative procedures set forth in Section 1415.
>
> ". . . It does not follow that because the plaintiff's request for an evaluation was improperly denied, she was deprived of her means of relief under the Act. The statute provides an express pro-

*Of the United States Court of Appeals for the Third Circuit, sitting by designation.

cedure to remedy wrongful actions of a school district or its employees, namely, the filing of an administrative complaint that triggers the right to a hearing" (PA 19).

As Judge Weis noted, §1415(b)(1)(E) of the EHA allowed the respondent to present any complaint with respect to the evaluation of her child or with respect to the provision of educational services. Instead of invoking any of the elaborate procedures provided by the EHA, respondent "chose instead to file an action under 1983 seeking, not education benefits, but money damages. . . ." after moving to another school district (PA 19).

If the respondent had been denied her procedural safeguard rights, an allegation which has been denied by the petitioners, she could have sought judicial relief as easily then as she now seeks judicial relief in this litigation. If the petitioners had indeed prevented delayed respondent from proceeding through the administrative process, "the proper course in such an event would be to seek judicial intervention to expedite an agency determination. See *Ezratty v. Puerto Rico*, 648 F2d 770, 777 . . .; see also *Stacey G. v. Pasadena Independent School District*, 695 F2d 949, 952, 955 . . ." (PA 20, 21). Under those circumstances, and as the District Court had done in *Hastings v. Maine-Endwell Central School District*, 676 F.2d 893 (2d Cir. 1982), "the district court would have the authority, pursuant to federal question jurisdiction, 28 USC §1331, to exercise its equitable powers and direct compliance with the statutory provisions" (PA 21).

In her complaint, respondent seeks not educational services for her son nor reimbursement for the cost of any educational services which she was compelled to obtain for her son, but rather compensatory and punitive damages

for her son as well as for herself. Respondent's claim may best be described as an educational malpractice claim, and the Circuit Court's decision permitting such a claim to advance forward is not only contrary to the long line of cases which have held that such a cause of action does not exist, but contrary to Congress' intent in promulgating the EHA.

As Judge Weis stated:

> "In Anderson v. Thompson, . . . the Court of Appeals for the Seventh Circuit pointed out that a compensatory damage remedy is inconsistent with the goals of the statute. Educational programs for the handicapped would suffer if school officials, out of fear of monetary liability for incorrect placements, hesitated to implement innovative reforms . . . To these concerns I add my belief that Congress did not intend that funds appropriated to educate the handicapped be diverted to pay tort damages and attorneys' fees such as are sought in this case . . ." (PA 22).

> "In sum, I would find that plaintiff should have availed herself of the remedies provided by Section 1415 either by filing an administrative complaint or by seeking court intervention requiring the school district to proceed with administrative hearings. The defendants' action or inaction did not bar access to those means of redress, and the procedures would not have been futile given the relief contemplated by the Act. Plaintiff chose instead to spurn those avenues and move out of the district. She should not now be allowed a Section 1983 action when she avoided the comprehensive provisions of Section 1415" (PA 24).

The Circuit Court decision has in essence created a significant distinction between the case where administrative remedies have been initiated to resolve complaints pertaining to handicapped students, and the case where the student or his parent claims that they were deprived of those administrative remedies. In the former case, an EHA claim not a Section 1983 claim, would be involved with no monetary damages apparently awardable in light of the Circuit Court's agreement with the Anderson v. Thompson decision. In the latter case, an EHA claim would not be involved under the Circuit Court's reasoning, but rather a claim under §1983 and its attendant monetary damages. As the majority also observed, "the chief practical difference between the two statutes is that the latter carries with it an express authorization for the recovery of attorney's fees in 42 U.S.C. §1988, while the former does not" (PA 8).

The Circuit Court's distinction between these two types of cases not only is inconsistent with the Seventh Circuit Court of Appeals' decision in Anderson v. Thompson, but it is inconsistent with the intent of the Congress in passing the EHA. The Court itself noted Congress' intent to "ensure that all handicapped children have available to them a free appropriate education . . . and . . . to relieve the fiscal burden placed upon the states and localities" (PA 10). Were this distinction to remain, a flood of lawsuits can be anticipated involving complaints of alleged misclassification or inappropriate placement. It can also be anticipated that such lawsuits will assert at least one allegation that the plaintiff was deprived of the procedural safeguard rights provided under the EHA in order to create a Section 1983 claim. School districts and their employees will not only have to expend time and financial resources in defending these cases, but subject themselves to the uncertainty of

jury verdicts regarding claims which neither the Congress in passing the EHA, nor the courts in rejecting educational malpractice claims, ever intended to apply to educational institutions or its employees.

The Circuit Court's exception to the conclusion that the EHA provides the exclusive remedy in cases involving the evaluation and the provision of free appropriate public education for students thought to be handicapped will result in the disruption of the educational system, and the diversion of funds appropriated for educational purposes away from their intended recipients. Such an exception indicates the general confusion which exists in this area of law, and the lack of consistent holdings emerging from the various District and Circuit Courts as to whether monetary damages, including attorneys' fees, are awardable in cases involving the classification and placement of handicapped students. The following is a summary of cases which illustrates the various and varying holdings which have been set forth by the courts in this area of law, and the need to have this Court provide some clarity at this time.

Some courts have held that the EHA is not preemptive and that a Section 1983 action can be brought based on EHA violations. *Cluff v. Johnson City School District*, 3 EHLR 553:598 (N.D. N.Y. 1982); *Department of Education v. Dorr*, 531 F Supp 517 (D.C. HI. 1982); *William S. v. Gill*, 536 F Supp 505 (D.C. Ill. 1982); *Tokarcik v. Forest Hills School District*, 665 F.2d 443 (3d Cir. 1981), cert. den'd., 102 S. Ct. 3508 (1982). One court has held that the EHA itself allows a claim for money damages. *Department of Education v. Dorr*, 531 F Supp 517 (D.C. Hawaii, 1982). Another court has held that a damage award under the procedural safeguard section of the EHA, if bad faith

were proven, could not exceed the amount expended in providing service to the child under his individual education plan. *Max M. v. Thompson,* 566 F Supp 1330 (D.C. Ill. 1983).

Other courts, such as the Seventh Circuit in *Anderson v. Thompson,* 658 F.2d 1205 (7th Cir. 1981), have held that Section 1983 claims in such cases are precluded. *Doe v. Koeger,* 710 F2d 1209 (7th Cir. 1983); *Hessler v. State Board of Education of Maryland,* 700 F.2d 134 (4th Cir. 1983); *Powell v. Defore,* 699 F2d 1078 (11th Cir. 1983); *Davis v. Maine-Endwell Central School District,* 542 F Supp 1257 (D.C. N.Y. 1982); *Jaworski v. Rhode Island,* 530 F Supp 60 (D.C. R.I. 1981). One court has held that a Section 1983 claim is precluded only if the relief requested is available under the EHA. *McGovern v. Sullins,* 676 F2d 98 (4th Cir. 1982). Another has held that money damages are not recoverable under the EHA regardless of whether there was bad faith. *Sanders v. Marquette Public Schools,* 561 F Supp 1361 (D.C. Mich. 1983).

Some courts have held that claims may be asserted under the Rehabilitation Act. *John A. v. Gill,* 565 F Supp 372 (D.C. Ill. 1983); *Sanders v. Marquette Public Schools,* 561 F Supp 1361 (D.C. Mich. 1983); *Hurry v. Jones,* 560 F Supp 500 (D.C. R.I. 1983); *Miener v. Missouri,* 673 F2d 969 (8th Cir. 1982); cert. den'd 103 S Ct 215; *Patton v. Dumpson,* 498 F Supp 933 (D.C. N.Y. 1980); *Turillo v. Tyson,* 535 F Supp 577 (D.C. R.I. 1982). Others have not. *Ruth Anne M., et al., v. Alvin Independent School District,* 532 F Supp 460 (D.C. Tex. 1982); *Boxall v. Sequoia Union High School District,* 464 F Supp 1104 (D.C. Ca. 1979). One case has held that either bad faith or gross misjudgment must be shown before a violation of the Rehabilitation Act can be asserted. *Monahan v. Nebraska,* 687 F2d 1164, (8th Cir. 1982) cert. den'd 103 S Ct 1252.

Some courts have held that neither EHA nor Rehabilitation Act claims can be asserted under Section 1983, and that tort damages are not recoverable. *Timms v. Metropolitan School District*, 1983-84 EHLR 555:177 (7th Cir. 1983); *Reineman v. Valley View Community School District*, 527 F Supp 661 (D.C. Ill. 1981); *Ruth Anne M. v. Alvin Independent School District;* 532 F. Supp. 460 (D.C. Tex. 1982); *Mark R. v. Bremen Community High School Dist. No. 228*, 546 F Supp 1027 (D.C. Ill. 1982).

Some courts have held not only that Section 1983 does not provide a remedy for violations of the EHA, but that Section 1983 does not apply even if equal protection and due process claims are asserted in the educational context. *Smrcka v. Ambach*, 555 F Supp 1227 (D.C. N.Y. 1983); *Doe v. Koger*, 710 F2d 1209 (7th Cir. 1983); *Reineman v. Valley View Community School District*, 527 F Supp 661 (D.C. Ill. 1981); *Mark R. v. Bremen Community High School Dist. No. 228*, 546 F Supp 1027 (D.C. Ill. 1982). One court has held that damages were not recoverable under either the EHA or the Rehabilitation Act, but were recoverable under Section 1983 for violation of equal protection rights.

Concerning the question of attorneys' fees, some courts have awarded Section 1988 attorneys' fees to plaintiffs prevailing on non-fee statutory claims, including the EHA. *Espino v. Besteiro*, 708 F2d 1002 (5th Cir. 1983); *Monahan v. Nebraska*, 687 F2d 1164 (8th Cir. 1982), cert. den'd 103 S Ct 1252; *Robert M. v. Benton*, 671 F2d 1104 (8th Cir. 1982). Others have not. *Smith v. Cumberland School Committee*, 703 F2d 4 (1st Cir. 1983); *Anderson v. Community Unit Dist. No. 228*, 70 Ill. Dec. 671, 449 N. E. 2d 1018 (Ill. 1983).

The above summary illustrates the disarray which exists in this area of law, and emphasizes the need to have this Court address these questions and to provide some guidance for courts, parents, and school officials. Without such guidance from this Court, a proliferation of lawsuits can be expected in light of the multifarious holdings which have been set forth by the courts. This Court in *Board of Education v. Rowley*, ____ U.S. ____, 102 S Ct 3034 (1982), for the first time began to address some of the questions raised by the EHA. The remainder of these questions are now ripe for the Court's consideration.

Conclusion.

Wherefore, petitioners respectfully pray that certiorari be granted to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 691—August Term, 1982

Argued: January 24, 1983 Decided: August 24, 1983

Docket No. 82-7695

BARBARA QUACKENBUSH, for herself and on behalf of her infant son, JASON GAMBEE,

Plaintiff-Appellee,

—against—

JOHNSON CITY SCHOOL DISTRICT, and CASPAR ROWLIND, Administrator for the Johnson City School District, individually and in his official capacity,

Defendants-Appellants.

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HOGAN & SARZYNSKI

Before:

OAKES, PRATT and WEIS*,

Circuit Judges.

* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

Interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), from an order of the Northern District of New York, Howard G. Munson, *Chief Judge*, denying defendants' motion to dismiss plaintiffs' claims under 20 U.S.C. § 1400 *et seq.*, 29 U.S.C. § 794, and 42 U.S.C. § 1983.

Affirmed.

Judge Weis dissents in a separate opinion.

RONALD R. BENJAMIN, Binghamton, New York, *for plaintiff-appellee.*

EDWARD J. SARZYNSKI, Binghamton, New York (Hogan & Sarzynski, Binghamton, New York, of counsel) *for defendants-appellants.*

ELIZABETH L. SCHNEIDER, Rochester, New York (Statewide Youth Advocacy, Inc., Rochester, New York, of counsel; David A. Monroe, Western New York Protection and Advocacy Office for the Developmentally Disabled, Neighborhood Legal Services, Inc., Buffalo, New York, Gerald P. Seipp, Serotte, Harasyn, Reich & Goldstein, Buffalo, New York, on the brief) *for Amicus Curiae.*

PRATT, *Circuit Judge*:

Defendants appeal by permission granted under 28 U.S.C. § 1292(b) from an order of the Northern District of New York, Howard G. Munson, *Chief Judge*, denying defendants' motion to dismiss plaintiff's complaint seeking damages under the Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.* (EHA), the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiff brought the action on behalf of herself and her infant son, Jason Gambee, a handicapped child, seeking damages from the defendant school district and one of its administrators, Caspar Rowlind, who at all relevant times was chairman of the school district's Committee on the Handicapped (COH), for depriving Jason of his federally guaranteed "right to a free appropriate public education". 20 U.S.C. § 1412(1).

THE COMPLAINT

Since the issue before us is whether the court below erred in denying the motion to dismiss, we accept as true, for purposes of the appeal, the facts alleged in the complaint. Those facts and the reasonable inferences to be drawn therefrom can be stated briefly. Jason was placed in a regular kindergarten class in the defendant district in September 1978, although the district then knew or should have known that he was a handicapped child in need of special educational services. Plaintiff Quackenbush, Jason's mother, took no action at the that time because district employees told her to wait until the following year. However, during the following year Jason

repeated kindergarten, again in a regular classroom setting.

Concerned about her son's lack of progress in the second year, Quackenbush had Jason evaluated by a psychologist who recommended that he be classified as learning disabled. A copy of the psychologist's evaluation was sent to the district's COH in April 1980. In June 1980 Quackenbush requested that Jason be reviewed by the COH. Immediately thereafter, defendant Rowlind come to Quackenbush's home with a "parental permission form" which Quackenbush filled in. On instructions of defendant Rowlind, Quackenbush left blank the area to be checked with respect to giving permission to conduct an evaluation of Jason. Rowlind took the form.

Although the complaint does not allege what action the school district took on plaintiff's request for special services, we infer that the district took no action whatsoever from that time forward. We also infer from the allegations that the district took no action on the request because Rowlind, without plaintiff's authority, put a check mark on the form in the box indicating that she denied the district permission to conduct an evaluation of Jason. Plaintiff alleges that Rowlind altered the form "for the sole purpose of denying [Jason] the special education he is entitled to." She further alleges that he acted pursuant to a policy of the defendant school district to refuse special education to handicapped children for financial reasons. As a result Jason was denied the special education to which he was entitled, suffered damages to his intellect, emotional capacity, and personality, and was impeded in acquiring necessary training. In addition, plaintiff alleges that she moved to a different school district to get the services Jason needed and that she herself suffered emotional distress.

Plaintiff seeks damages under five causes of action: (1) that defendants' failure to properly and timely identify Jason as a handicapped child and to provide him with special education violated plaintiff's rights under the EHA; (2) that defendants' actions violated Jason's rights under the Rehabilitation Act; (3) that defendants' actions, taken under color of law, deprived Jason of his right to "an appropriate public special education" pursuant to a policy of refusing to provide learning disabled children with the special services they require; (4) that defendants' actions created two classes of learning disabled children, those who receive special education and those who do not, thereby depriving Jason of equal protection of the law; and (5) that defendant Rowlind's false and malicious conduct in cheating plaintiff and Jason of their rights violated the constitution.

Defendants moved in the district court to dismiss the complaint, arguing that plaintiff's claim that Jason was denied needed educational services did not state a claim under 42 U.S.C. § 1983, that plaintiff failed to exhaust her administrative remedy, and that the EHA provided an exclusive remedial scheme which plaintiff could not circumvent either by moving to another school district or by asserting her claims under § 1983.

DECISION BELOW

The district court denied defendants' motion to dismiss and held that plaintiff had sufficiently alleged claims under § 1983. After noting that § 1983 permits a litigant to recover for the deprivation of any federal right whether rooted in statute or constitution, the district court addressed the deprivations alleged under the EHA, the

Rehabilitation Act, and the due process and equal protection clauses of the constitution.

As to the EHA, the district court found sufficient the broad assertion that defendants were on notice that Jason had a handicapping condition but did nothing. As to the Rehabilitation Act, the court stated, inaccurately, that the complaint alleged that Jason had been excluded from the public schools solely because of his learning disability. Actually, the complaint does not allege exclusion from the public schools, but only exclusion from "a free and appropriate special education". As to the constitutional claims, the court found, without analysis, sufficient allegations of violations of procedural due process and equal protection guarantees to support a § 1983 action. The district court also rejected defendants' argument that plaintiff was required to exhaust available administrative remedies because it found that plaintiff, having left the school district, had no administrative remedies to exhaust and that damages, the only relief sought by plaintiff, were not available through the administrative process.

Finally, the district court addressed defendants' contention that the EHA provides an exclusive injunctive remedy which bars use of enforcement through § 1983. Relying primarily on the "plain language of the statute" that under the EHA the court "shall grant such relief as [it] determines is appropriate", the district court rejected the conclusion of the Seventh Circuit in *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), and held that the EHA remedy was neither exclusive nor limited to injunctive relief. On the contrary, the district court held, violation of plaintiff's rights under the EHA may give rise to a cause of action for damages that is enforceable under § 1983. Accordingly, the district court denied defendants' motion to dismiss.

On defendants' request, the district court amended its order and certified, pursuant to 28 U.S.C. § 1292(b), that the order involved controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal would materially advance the ultimate termination of the litigation. The specific legal questions identified were:

> (a.) whether the [EHA] provides an exclusive private right of action for complaints involving educational services for handicapped students;
>
> (b.) whether the [EHA] provides to aggrieved plaintiffs as an exclusive remedy for its violation injunctive relief only, with no right to compensatory damages or attorneys' fees; and
>
> (c.) whether administrative remedies need not be exhausted when plaintiffs no longer reside in the defendant-school district.

In its order of amendment the district court noted that both the Seventh Circuit in *Anderson v. Thompson*, and another judge of the Northern District of New York in *Davis v. Maine-Endwell Central School District*, 542 F. Supp. 1257 (N.D.N.Y. 1982), had held that the remedy provided under the EHA is exclusive and limited to injunctive relief only. We granted leave to appeal.

DISCUSSION

We are presented with a problem of statutory construction which focuses specifically on whether Congress intended damages to be an available remedy for the type of violation of the EHA alleged here, and if so, whether those damages are recoverable only in an action brought

under 20 U.S.C. § 1415(e)(2), or whether they may be recoverable in an action brought under 42 U.S.C. § 1983. The chief practical difference between the two statutes is that the latter carries with it an express authorization for the recovery of attorney's fees in 42 U.S.C. § 1988, while the former does not.

Before focusing upon Congress's intent with respect to remedies, we review briefly the general purpose and structure of the EHA. The Education for All Handicapped Children Act (now the "Education of the Handicapped Act", 20 U.S.C. § 1400(a) (Supp. V 1981) was enacted in 1975, Pub. L. 94-142, 89 Stat. 773, in response to Congress's concern that "[m]ore than half of all handicapped children in the United States are not receiving an education appropriate to their needs * * * [and that] [o]ne million children * * * are receiving no education at all." H.R. Rep. No. 332, 94th Cong., 1st Sess. 7 (1975). The statute, a successor to the Education for the Handicapped Act of 1970, Pub. L. 91-230, 84 Stat. 119, and the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, was aimed primarily at providing handicapped children with access to public education. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 102 S. Ct. 3034, 3043 (1982).

To accomplish this goal, the EHA provides federal funding to state and local education agencies for educating handicapped children, 20 U.S.C. § 1411, sets conditions for eligibility for the receipt of these funds, § 1412, requires eligible states to submit plans outlining their policies and procedures for compliance, § 1413, and provides for withholding federal funding if the Commissioner of Education determines that the state or local education agency has failed to comply substantially with the eligibility conditions, or with its state plan, § 1416. If

a state is dissatisfied with the commissioner's disapproval of its state plan, or other action with respect to the plan, it may seek review of that action in the appropriate circuit court, § 1416.

The EHA requires that a local education agency, to be eligible for funding, provide a "free appropriate public education", defined in part as "special education and related services", § 1401(18), to those children who are handicapped within the meaning of the statute, § 1401(1). An "individualized education program" (I.E.P.), § 1401(19), must be developed for each child, and the program must be reviewed and, if necessary, revised at least annually, § 1414(a)(5).

At the heart of the statute, and particularly germane to the issues before us, are the procedural safeguards required by § 1415 in the statute's blueprint for state and local programs. Those safeguards encompass both administrative and judicial proceedings. On the administrative level they must include, but are not limited to: the opportunity for a parent or guardian of a handicapped child to examine the child's records and to obtain an independent educational evaluation of the child, § 1415(b)(1)(A); written prior notice to the parent or guardian whenever the school district proposes or refuses to initiate or change the child's identification, evaluation, or placement, § 1415(b)(1)(C); a requirement that, when feasible, parents be informed in their native language of all the procedures available under the section, § 1415(b)(1)(D); and "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child", § 1415(b)(1)(E). A parent who has filed such a complaint has the opportunity for an impartial due

process hearing, § 1415(b)(2), and "any party aggrieved by the findings and decision" of that hearing, may appeal to the state educational agency for an impartial review, § 1415(c). Parties to the administrative hearings have the rights to be advised by counsel and by individuals with special knowledge or training in the problems of handicapped children, to present evidence, to confront, cross-examine, and compel the attendance of witnesses, to a record of the hearing, and to written findings of fact and decisions, § 1415(d).

A decision at the end of the administrative process is final except for the judicial review authorized by § 1415(e)(2). That judicial review is available to "any party aggrieved by the findings and decision" at the administrative level. Such an aggrieved party may bring a civil action "with respect to the complaint" presented pursuant to § 1415. The action may be brought in state court or in a United States district court, which "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2).

In enacting the statute, Congress hoped to assist the states in identifying and evaluating handicapped children and providing them with a free appropriate public education. "The purpose of the pending measure is to ensure that all handicapped children have available to them a free appropriate education * * * and * * * to relieve the fiscal burden placed upon the states and localities." 121 Cong. Rec. S. 37417 (daily ed. Nov. 19, 1975) (statement of Sen. Schweiker); *see Board of Education of Hendrick Hudson Central School District v. Rowley*, 102 S. Ct. 3034, 3048 (1982) ("Congress sought primarily to identify

and evaluate handicapped children, and to provide them with access to a free public education"). To achieve this goal, Congress passed what it perceived as "a series of comprehensive and carefully thought out provisions", 121 Cong. Rec. S. 37413 (daily ed. Nov. 19, 1975), (statement of Sen. Williams), which "set forth a comprehensive program to meet the unmet needs of all handicapped children", *id.* at 37416. Representatives and senators alike believed that the legislation represented a comprehensive and far-reaching approach to providing appropriate educational services for handicapped children. "[T]his legislation * * * will prove to be the long awaited step towards a national program to ensure quality education to all handicapped Americans * * * ". 121 Cong. Rec. H. 37029 (daily ed. Nov. 18, 1975) (statement of Rep. Conte).

The procedural protections, in particular, were seen as an important and comprehensive means of achieving the goals of the statute. Representative Perkins, chairman of the House Committee on Labor and Education, spoke of the procedural safeguards as "designed to further the congressional goal of ensuring a full educational opportunity for all handicapped children." *Id.* at H. 37025. Apparently Congress intended the court to have a significant role in achieving the substantive goals of the statute for it provided that the court may take additional evidence and base its decision "on the preponderance of the evidence". However, in *Hendrick Hudson*, the Supreme Court rejected a standard of *de novo* review, saying "the provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." 102 S. Ct. at 3051.

In its attempt to guarantee a "free appropriate public education" to all handicapped children, the EHA establishes substantive rights and procedural safeguards. The substantive right to a free appropriate public education has been interpreted by the Supreme Court to mean

> personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade level used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. at 3049 (footnote omitted).

It would have been extraordinarily difficult, if not impossible, for Congress to have been more precise in defining the special educational needs of particular handicapped children. Instead, Congress sought through its procedural safeguards to open the channels of communication between the parents of each child and the school administrators with a view toward developing the most appropriate program for each particular child. We thus are presented with an unusually detailed description of the administrative procedures required of a school district, and compliance with those procedural safeguards is an essential step in achieving the statutory goal of a free appropriate public education.

We have no difficulty with the question of whether the judicial review contemplated by § 1415(e)(2) is the exclusive means for reviewing a *final* administrative decision under the EHA. We think it is. Congress provided in § 1415 an elaborate, precisely defined administrative and judicial enforcement system. The communication, cooperation, and exchange of ideas needed to develop a particular child's I.E.P. are greatly facilitated by adherence to the administrative procedures outlined in the statute. On the other hand, permitting separate judicial relief under § 1983 as an alternative to use of the administrative-judicial scheme established in § 1415 would undercut significantly the objectives sought by Congress in enacting the EHA. In these circumstances, we think that the judicial review provided by § 1415(e)(2) is an exclusive remedy that can neither be supplemented nor replaced by an action under 42 U.S.C. § 1983. *See Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981); *CETA Workers' Organizing Committee v. City of New York*, 617 F.2d 926, 933-34 (2d Cir. 1980).

This view, however, does not dispose of the appeal, because the judicial review provided by § 1415(e)(2) is not available in the circumstances alleged here. Plaintiff has not proceeded through the administrative stages; indeed, her complaint is that through a policy of the school district she was deprived of the opportunity to take advantage of the procedural safeguards offered by the statute. She alleges that defendant Rowlind induced her to leave blank the answer to the question of whether she would permit Jason to be evaluated and then, without her authority, substituted a negative answer to the question. In these circumstances, plaintiff is not eligible for judicial review under the EHA because she is not a "party

aggrieved by the findings and decision" following an impartial due process hearing in the state educational system. Clearly then, plaintiff is not expressly granted any right of judicial review under § 1415.

Nor does the legislative history suggest a particular remedy for interference with the procedural safeguards. However, it is unthinkable that Congress would have intended that a plaintiff such as Quackenbush, who as the case presented itself sought for two years to have the school district provide services, made a direct request for evaluation, and was deprived of that request by school district forgery, should be left without any remedy. Particularly in a statutory scheme such as the EHA where great emphasis is placed upon procedural safeguards, we must assume that Congress intended some kind of relief when, through school district policy or misconduct of school officials or both, a handicapped child is deprived of the procedural safeguards guaranteed by § 1415. Assuming, then, that Congress intended a remedy here, the question remains whether that remedy, which all parties to this appeal assume to exist, is to be implied in § 1415(e)(2), or whether it is to be found in § 1983, which guarantees a citizen relief from state deprivations of federally granted rights.

Section 1983 is a general remedial statute aimed at preventing lawlessness by state and local governments. Defendants' deliberate interference with procedural safeguards guaranteed by Congress for the purpose of depriving Jason of special educational services necessary to provide him with free appropriate public education would constitute the deprivation of a right guaranteed under federal law within the meaning of § 1983. Section 1983 is available to enforce both statutory and constitutional rights. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

After examining both statutes as well as the circumstances of this case, we believe and conclude that the better solution is to permit § 1983 to supply the right of action to a plaintiff who has been denied procedural safeguards under § 1415 and who, as a result thereof, has not received the findings and decision following the impartial due process administrative hearing contemplated by § 1415. In *Hymes v. Harnett County Board of Education*, 664 F.2d 410 (4th Cir. 1981) the Fourth Circuit viewed the absence of any prescribed remedy in the EHA for deprivations occurring prior to a final administrative decision as a "lacuna" to be filled by § 1983. *Id.* at 413. Essentially, we agree with that approach. By limiting relief under § 1415(e)(2) only to parties aggrieved by the findings and decision of the administrative agency, Congress rather clearly disclosed its intention that that section not be used to provide relief for procedural deprivations whose effect was to prevent a handicapped child from ever reaching the stage of a final administrative determination. Because of the availability of § 1983 to remedy such deprivations of the procedural rights granted by the statute, it was unnecessary for Congress to provide a separate scheme of judicial relief for plaintiffs who never reach the stage of "findings and decision" due to defendants' misconduct.

In short, the district court did not err in refusing to dismiss, because, as we have interpreted the complaint, it sets forth a cause of action against the school district under § 1983 for compensatory damages based upon its alleged policy to avoid providing expensive special educational services by preventing handicapped children from gaining access to the procedural safeguards guaranteed by the statute. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978). Defendant Rowlind's conduct, if

established at trial as it is alleged, could render him personally liable for both compensatory and punitive damages. Unlike Rowlind, of course, the school district could not be held liable for punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

The district court also identified for interlocutory review the problem of whether administrative remedies need to be exhausted by a plaintiff who no longer resides in the school district. While the issue had once been in doubt, the Supreme Court has now ruled that a plaintiff need not exhaust state administrative remedies before bringing an action under § 1983. *Patsy v. Board of Regents of State of Florida*, 102 S. Ct. 2557 (1982). The lack of an exhaustion requirement, however, helps to focus the nature of plaintiff's grievance. She claims that defendants' conduct deprived her of access to the procedural safeguards that Congress intended be available through the administrative structure. As a result, because Jason was not getting the free appropriate public education to which he was entitled, plaintiff moved to a neighboring district in order to obtain the special services needed to secure him that education. We express no opinion on what damages, if any, plaintiff might be entitled to recover should she prove her allegations. We find it fitting, however, that defendants should be required to respond in damages for those injuries caused by their conduct which deprived plaintiffs of access to the administrative system and procedural safeguards guaranteed to them by Congress. It is equally fitting that defendant Rowlind respond in punitive damages if, for the purpose of depriving Jason of special education services, he falsely recorded on her form that plaintiff did not consent to an evaluation of Jason.

Our conclusion is consistent with the result in *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), which held that the remedy under § 1415(e)(2) excluded and was inconsistent with § 1983 relief. At issue before the *Anderson* court was review of the state administrative placement decision. As previously indicated, when the state administrative process has run its course concluding in findings and a decision, we agree that Congress intended the remedy under § 1415(e)(2) to be exclusive.

Our decision in *Hastings v. Maine-Endwell Central School District*, 676 F.2d 893 (2d Cir. 1982), is also consistent with our decision today. There, on an appeal from an award of attorney's fees under 42 U.S.C. § 1983, the issue was whether the underlying claim arose under § 1983. Holding that it did, we focused upon the school district's abuse of the due process procedural safeguards accorded to parents of handicapped children:

> The district court's order granting the injunction stated that the School District had "chosen to abuse the due process procedural safeguards" accorded to parents of handicapped children * * *, and this Court affirmed the injunction, observing that "[t]he present action is not pending under the EHA, but rather is brought pursuant to 42 U.S.C. § 1983 to recover for the asserted violation by the defendants of plaintiffs' due process rights * * *."

Id. at 897. *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982), which recognized a § 1983 action in the context of an EHA claim, is likewise consistent, for there the school district conceded that it had failed to provide the statutory safeguards guaranteed by Congress.

As indicated above, this plaintiff has no claim under § 1415(e)(2). Thus, it is unnecessary for us to reach the

question of whether damages are available under that section. Similarly, we have not considered any possible overlap between the Rehabilitation Act and the EHA, nor have we probed for possible constitutional violations mentioned in passing by the district court but not included in the § 1292(b) certification of controlling questions of law.

The order of the district court is affirmed, and the matter remanded for further proceedings consistent with this opinion.

WEIS, *Circuit Judge, dissenting.*

The majority opinion is a persuasive and compelling explanation of why the remedy provided by the Education of the Handicapped Act is the exclusive means for reviewing a final administrative decision. I agree completely with the majority's position that "the judicial review provided by § 1415(e)(2) is an exclusive remedy that can neither be supplemented nor replaced by an action under 42 U.S.C. § 1983."

Having arrived at the correct conclusion, however, the majority finds it inapplicable here because the school district's Committee on the Handicapped never acted upon the plaintiff's request for evaluation of her son. The school district's inactivity is assumed to have been caused by the improper action of Mr. Rowlind who, by checking the wrong box on the request form, incorrectly signified that plaintiff withheld permission to have the school district evaluate her child. This conduct was allegedly "carried out pursuant to an unlawful policy of the [school district] to refuse to provide . . . special education to

handicapped children." By these actions, the majority reasons, the child was "deprived of the safeguards guaranteed by § 1415" and plaintiff is therefore entitled to relief under section 1983.

I do not agree that there has been a deprivation in this case such as to justify the application of section 1983. No action taken by Rowlind nor any school district policy identified by plaintiff prevented her use of the administrative procedures set forth in section 1415. I therefore dissent from the decision to permit application of section 1983 in this case.

It does not follow that because the plaintiff's request for an evaluation was improperly denied, she was deprived of her means of relief under the Act. The statute provides an express procedure to remedy wrongful actions of a school district or its employees, namely, the filing of an administrative complaint that triggers the right to a hearing.

The plaintiff had a right under section 1415(b)(1)(E) to present a complaint "with respect to any matter relating to the . . . evaluation . . . of the child, or the provision of a free appropriate public education to such child." After a complaint is filed, a parent is entitled to "an impartial due process hearing." 20 U.S.C. § 1415(b)(2). An administrative appeal may be taken from an adverse decision if the original hearing is "conducted by a local educational agency or an intermediate educational unit." *Id.* § 1415(c). Judicial review is available following completion of the administrative process. *Id.* § 1415(e).

Plaintiff failed to invoke any of these procedures. She chose instead to file an action under section 1983 seeking, not educational benefits, but money damages on the ground that defendants "failed to comply with the provi-

sions of the [A]ct in that they . . . failed to provide [the child] with the special education he is entitled to."

In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979), the Supreme Court cautioned that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." The point was made more emphatically in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981), where the Court adopted language first used in Justice Stewart's dissent in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 673 n.2 (1979). "[W]hen 'a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983.' " *See also Bush v. Lucas*, 51 U.S.L.W. 4752 (U.S. June 13, 1983); *Guardians Association v. Civil Service Commission of New York*, 51 U.S.L.W. 5105, 5113 n.3 (U.S. July 1, 1983) (Powell, J., *concurring*).

As the majority concedes, the statute in this case provides the type of comprehensive enforcement scheme that precludes an action under section 1983. Instead of seeking relief through the process established by section 1415, however, plaintiff moved from the school district five months after the encounter with Rowlind and brought suit a year later. The failure to use the procedures explicitly provided by statute to remedy actions by school authorities should preclude plaintiff from now obtaining relief under section 1983.

Even if defendants delayed plaintiff from proceeding through the administrative process, that would not justify bypassing these procedures altogether. The proper course in such an event would be to seek judicial intervention to

expedite an agency determination. *See Ezratty v. Puerto Rico*, 648 F.2d 770, 777 & n.11 (1st Cir. 1981) (citing *Campochiaro v. Califano*, No. H-78-64 (D. Conn. May 18, 1978)); *see also Stacey G. v. Pasadena Independent School District*, 695 F.2nd 949, 952, 955 n.5 (5th Cir. 1983). In these circumstances, the district court would have the authority, pursuant to federal question jurisdiction, 28 U.S.C. § 1331, to exercise its equitable powers and direct compliance with the statutory provisions. *See Smith v. Lehman*, 689 F.2d 342, 345 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3552 (Jan. 24, 1983) (federal question jurisdiction to hear claim that Constitution requires hearing before job dismissal); *Ellis v. Blum*, 643 F.2d 68, 76 (2d Cir. 1982) (federal question jurisdiction of Social Security Act).

In *Hymes v. Harnett County Board of Education*, 664 F.2d 410 (4th Cir. 1981), the Court of Appeals for the Fourth Circuit reasoned that because the Education of the Handicapped Act provided no specific judicial relief for violation of the section 1415(e)(3) status quo requirement, section 1983 could be used to enforce that provision pending exhaustion of administrative remedies. Once defendant complied with section 1415(e)(3), the hearings mandated by the Act were assured, and the court viewed further relief under section 1983 as "superfluous." "Thereafter . . . a proceeding under § 1983 served no useful purpose and should be ignored." *Id.* at 413.

I am not persuaded that the lacuna in the enforcement scheme of the Act, which the *Hymes* court believed to exist and used to support its limited application of section 1983, is present in the case at hand. Here, section 1983 is entirely "superfluous." The way to enforce compliance with the hearing procedures of the statute and thus effectuate congressional intent is by the use of the court's

traditional equity powers. *See Smith v. Lehman, supra*; *Ellis v. Blum, supra*.

The plaintiff's complaint suggests, however, that resort to the administrative process would be futile in this case because the "Commissioner of Education . . . is not authorized to award compensatory and punitive damages." On this point, the district court further observed that "having left the school district, the plaintiffs have no administrative remedies to exhaust."

I would add, however, that the complaint states that the child is presently receiving appropriate special education services. Thus the assertion of futility cannot be applied to a claim for current or prospective relief because the child's educational needs are presently satisfied. As for the monetary claim, it follows that if the statute provides the exclusive means of relief and the damages sought by plaintiff are not available under the Act, then the inability of the administrative process to award such damages cannot justify its bypass.

In *Anderson v. Thompson*, 658 F.2d 1205, 1209-1214 (7th Cir. 1981), the Court of Appeals for the Seventh Circuit pointed out that a compensatory damage remedy is inconsistent with the goals of the statute. Educational programs for the handicapped would suffer if school officials, out of fear of monetary liability for incorrect placements, hesitated to implement innovative reforms. *Id.* at 1213. To these concerns I add my belief that Congress did not intend that funds appropriated to educate the handicapped be diverted to pay tort damages and attorneys' fees such as are sought in this case. *See also Mountain View-Los Altos Union School District v. Sharon B.H.*, 709 F.2d 28 (9th Cir. 1983) (following *Anderson*); *Mienor v. Missouri*, 673 F.2d 969, 979-80 (8th

Cir.), *cert. denied*, 51 U.S.L.W. 3280 (October 12, 1982) (damage remedy "not generally intended").

The court in *Anderson* recognized, however, that reimbursement to parents for their expenses in obtaining services might be available in certain exceptional circumstances. Thus, where the child's health is in danger or the school district acts in bad faith, parents could recoup the cost of obtaining services that should have been provided by the school system. 658 F.2d at 1213-14 & n.12; *see also Zvi D. v. Ambach*, 694 F.2d 904, 908 n.8 (2d Cir. 1982) (reserving question on general and reimbursement damages); Hyatt, "Litigating the Rights of Handicapped Children to an Appropriate Education: Procedures and Remedies," 29 UCLA L. REV. 1, 43-51 (1981) (advocating limited damage awards).

Plaintiff in this case, however, has not presented any claim for "reimbursement" type damages. The compensatory damages sought in the complaint are confined to the mother's "emotional distress and anguish" and for the harm incurred because the "plaintiff's infant has been impeded in acquiring" necessary training. Punitive damages are sought for the "false and malicious conduct" of Rowlind. Thus, even under the rationale of *Anderson*, the damages sought by plaintiff are not available under the Act.[1]

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1 The Senate Committee report gives strong indication that reimbursement damages should also be considered in the administrative process. "If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under section [1415] applies." S. Rep. No. 168, 94th Cong., 1st Sess. 32 (1975), *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1456. *See also* Zvi D. v. Ambach, 694 F.2d at 907.

In essence then, we are led back to the majority's determination that Congress did not intend to have section 1983 supplement or replace the remedial plan of the Education of the Handicapped Act. Under the majority's view, section 1983 may not be used to collect compensatory damages following exhaustion of the admininstrative process. It follows inescapably, I believe, that if the damages sought here are not recoverable through or after completion of the administrative route, they should not be available under section 1983 when the administrative process is bypassed. *See McGovern v. Sullins*, 676 F.2d 98 (4th Cir. 1982); *see also Anderson v. Thompson*, 658 F.2d at 1214-17 (because the EHA does not contain a damage remedy, section 1415 "cannot be given 'unimpaired effectiveness' if a section 1983 action is available"). Holding otherwise would allow parties to make themselves eligible for damages simply by failing to resort to their administrative remedies, as plaintiff did here. Such evasion of congressional aims cannot be permitted.

In sum, I would find that plaintiff should have availed herself of the remedies provided by section 1415 either by filing an administrative complaint or by seeking court intervention requiring the school district to proceed with administrative hearings. The defendants' action or inaction did not bar access to those means of redress, and the procedures would not have been futile given the relief contemplated by the Act. Plaintiff chose instead to spurn those avenues and move out of the district. She should not now be allowed to pursue a section 1983 action when she avoided the comprehensive provisions of section 1415.

I have confined myself solely to the question of damages under the Education of the Handicapped Act. As the majority indicates, plaintiff has asked for relief on other

grounds, but I do not discuss them here because I read the district court's recitation of the questions certified as confined to the Education of the Handicapped Act. I therefore do not address the question whether the allegations of misconduct by Rowlind state a cause of action under section 1983 for violation of the fourteenth amendment separate and apart from an action under the Education of the Handicapped Act.

It is unfortunate that this case reaches us in a posture where the question of law to be addressed is not as sharply defined as it would have been had the facts been developed more definitively in the district court. In view of the overlapping claims and the vague nature of the plaintiff's complaint, I harbor substantial doubt about the desirability of entertaining a section 1292(b) appeal in this case.

APPENDIX B.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JAN 21 1982

BARBARA QUACKENBUSH, for herself and on behalf of her infant son JASON CAMBEE,

Plaintiffs,

v. 81-CV-1093

JOHNSON CITY SCHOOL DISTRICT, and CASPER TOWLIND, Administrator for the Johnson City School District, individually and in his official capacity,

Defendants.

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EDWARD J. SARZYNSKI, ESQ.

MEMORANDUM-DECISION AND ORDER

The plaintiff has instituted this action to recover compensatory and punitive damages for alleged violations of the Education for All Handicapped Children Act [EAHCA], 20 U.S.C. §§ 1401 et seq., the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Due Process and Equal Protection Clauses to the Constitution of the United States. Jurisdiction is invoked under 20 U.S.C. § 1415(e) and 28 U.S.C. §§ 1331(a), 1343(a)(3) and (4). The gravamen of the complaint is that the defendants failed to classify Jason as a handicapped child with a learning disability, and failed to provide Jason any supportive services.

Presently before the Court is a motion by the defendants to dismiss the complaint.

The first basis for the defendants' motion to dismiss is that the complaint identifies no federal right that has been denied the plaintiffs, and that, accordingly, the complaint states no claim for relief under 42 U.S.C. § 1983.

Section 1983 of Title 42 provides that a litigant may recover for the deprivation of any federal right, whether this right has its root, e.g., in a federal statute or in the Constitution of the United States. See 42 U.S.C. § 1983, Pennhurst State School and Hospital v. Halderman, 101 S. Ct. 1531, 1545 (1981); Maine v. Thiboutot, 448 U.S. 1, 408 (1980). In this regard, the plaintiffs have broadly asserted that the defendants were on notice that Jason had a handicapping condition, but did nothing. These allegations sufficiently draw into question rights under the EAHCA, which affords handicapped children a "right to a free appropriate public education," 20 U.S.C. § 1412(1), and requires States to supply special education and related services in recognition of this right, 20 U.S.C. § 1412(2). Additionally, the complaint states that Jason has been excluded from the public schools solely because of his learning disability. This contention implicates significant rights under the Rehabilitation Act, violations of which the Second Circuit has indicated give rise to a cause of action under Section 1983. See Swan v. Stoneman, 635 F.2d 97 (2d Cir. 1980). Moreover, although the plaintiffs cannot assert violations of a constitutional right to an appropriate education, see San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the plaintiffs may certainly complain of violations of procedural due process and equal protection constitutional guarantees in a § 1983 action. On this score, examining the averments

contained in the complaint, this Court must conclude that the plaintiffs have set forth colorable due process and equal protection arguments.

Because these asserted violations are claimed to have been intentionally unredressed by the defendants, see Doe v. New York City Department of Social Services, 649 F.2d 134, 141 (2d Cir. 1981), Turpin v. Mailet, 619 F.2d 196, 201 and n.5 (2d Cir. 1980), they state claims under § 1983, and the defendant's motion to dismiss on this ground is denied.

II.

The second basis for the defendants' motion to dismiss is that the plaintiffs have failed to exhaust available administrative remedies. With respect to this contention, the complaint indicates that the plaintiffs requested the defendants' Committee on the Handicapped to review Jason's situation. When the Committee allegedly failed to act, the plaintiffs apparently made no attempt to seek administrative review of the Committee actions, and instead chose to move out of the defendants' school district.

While it may be that if the plaintiffs had remained in the defendants' school district, they would be barred from raising one or more of their claims, it is apparent to this Court that having left the school district, the plaintiffs have no administrative remedies to exhaust. Moreover, even if the plaintiffs were to resort to administrative review channels, their efforts would be futile in regard to the claims before this Court, inasmuch as the State Commissioner of Education has no authority to award the relief requested by the plaintiffs.

Hence, the defendants' motion to dismiss on this ground is denied.

III.

The defendants argue further that the plaintiffs cannot invoke any rights they may have under the EAHCA in a § 1983 action because 20 U.S.C. § 1415(e) provides an exclusive injunctive remedy.

With respect to this argument, the Supreme Court has indicated that Section 1983 may not be available where the governing statute provides an "express", "exclusive" remedy. Pennhurst State School School and Hospital v. Halderman, 101 S. Ct. at 1545. See Middlesex City Sewerage Authority v. National Sea Clammers Association, 101 S. Ct. 2615, 2626-27 (1981). This Court shall hence turn to the requirements of the EAHCA.

The Court shall "begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980). Section 1415(e) of the EAHCA provides that in any civil action brought by an aggrieved person, the court "shall grant such relief as [it] determines is appropriate." Plainly, the language of this section places no limitations upon the forms of remedies available to the court. Nor does the expressed legislative history contain language explicitly restricting, or explicitly specifying, the forms of relief in any such civil action. The only inquiry that remains is whether, despite the presumptive conclusiveness of the language of Section 1415(e), "[extra]ordinar[y]" circumstances exist that would warrant a conclusion contrary to the ordinary language of this statute.

In this regard, the Seventh Circuit, relying solely upon alleged implicit expressions of congressional intent, has recently concluded that "generally" the only relief a court may award in a civil action brought under this section is injunctive relief. Anderson v. Thompson, 658, F.2d 1205 (7th Cir. 1981). The Seventh Circuit rested this conclusion upon two considerations. Firstly, the Court examined other features of the legislative history, and apparently found it "generally" impossible to reconcile an award of damages with these features:

> Congress enacted the EAHCA in order to aid the states in educating their handicapped children by providing the necessary funds. The legislative history shows an emphasis on procedural safeguards to ensure appropriate placements, a recognition that diagnosis of special education problems was difficult and uncertain, an awareness of severe budgeting constraints, and an acknowledgment that it would take time for all handicapped children to be helped. In those circumstances, and without even a word of discussion about damages, we infer that that remedy was not generally intended.

Id. at 1213. See id. at 1211-13. Secondly, the Court reviewed the "goals" of the EAHCA, and reasoned that a damage remedy would be "generally" inconsistent with these goals, except where a child's physical health would be impaired by an improper placement or where authorities acted in bad faith by failing to comply with the procedural safeguards set forth in Section 1415. Id. at 1212-13. In this regard, the Court made these observations about the "goals" of the EAHCA:

> When a school district makes a good faith effort to provide a child with an appropriate education, we do not believe that as a general rule it is good policy to require that a school district pay money damages if it later turns out that a different programming decision should have been made. Moreover, in as new and undeveloped a field

> as special education, there is a need for flexibility and experimentation in programming for handicapped children . . . [W]e perceive that educational programs for the handicapped will suffer if school officials, for fear of exposing themselves to monetary liability for incorrect placements, hesitate to implement innovative educational reforms.

Id. at 1213. Because of its conclusion that the exclusive remedy under the EAHCA was injunctive relief, the Court went on to hold that an aggrieved person could not circumvent the general exclusivity of this remedy by suing under § 1983. Id. at 1216-17.

This Court, however, does not share the position of the Seventh Circuit that in enacting the EAHCA, Congress implicitly intended a limited exclusivity of remedy in certain situations. Although the Anderson court cited some congressional concerns regarding the classification and placement of children who are actually handicapped, it omitted reference to what appears to be the overriding consideration behind the prescription of procedural safeguards, namely, a "dee[p] concer[n] about practices and policies which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions." S. Rep. No. 94-168, 94th Cong., 1st Sess. at 26-67. Along this same line, Congress expressed its alarm about the "suffer[ing]" of children who have been overclassified, id. at 27, and its desire that local officials not overclassify children for the purpose of receiving EAHCA funds, id. at 28. In view of these humanitarian and fiscal interests, there is nothing at all incongruous about affording a compensatory damage remedy in favor of persons who have not received necessary services from school districts. Such a remedy compliments the procedural safeguards by ensuring, through deterrence, that school districts properly disburse EAHCA funds toward the education of children truly in need of, and entitled

to, the benefits derived from these funds. For this reason, notwithstanding the ruling of the Seventh Circuit, this Court is not convinced that there is "a clearly expressed legislative intention" contrary to the literal language of Section 1415(e). Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. at 108. The Court thus concludes that "such relief as . . . is appropriate," 20 U.S.C. § 1415(e), may take the form of damages.

In reaching this conclusion, the Court is aware that under certain circumstances, "[w]hen the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex City Sewerage Authority v. National Sea Clammers Association, 101 S. Ct. at 2627. Under the EAHCA, however, the procedural guidelines were designed to prevent improper classifications and placements, and thus cannot readily be characterized as "remedial." More importantly, the plain language of the statute sufficiently negates, in the judgment of the Court, any interpretation of the EAHCA that would result in the preemption of a remedy under § 1983.

Accordingly, because the EAHCA does not foreclose the availability of damages, this Court is of the view that the plaintiffs may maintain this § 1983 action. In making this determination, however, this Court wants to make clear that it is not expressing an opinion as to whether any damages would be appropriate in this case.

IV.

Finally, the defendants argue that this § 1983 action is barred by a one year statute of limitations. Relying on Staffen v. City of Rochester, 80 A.D.2d 16, 437 N.Y.S.2d 821 (4th Dep't. 1981). Because the Second Circuit has recently reaffirmed its position that a three year statute of limitations applies in federal § 1983 actions, Pauk v. Board of Trustees, F.2d , slip opinion (2d Cir. July 22, 1981), however, the defendants' motion to dismiss is denied.

V.

For the foregoing reasons, the defendants' motion to dismiss is denied in all respects.

It is so Ordered.

Dated: January 18, 1982
Syracuse, New York

Howard G. Munson
Chief U.S. District Judge

APPENDIX C.

Education For All Handicapped Act, 20 U.S.C. §§ 1400, *et seq.*

"Section 1415. PROCEDURAL SAFEGUARDS.

"(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

"(b)(1) The procedures required by this section shall include, but shall not be limited to—

"(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

* * *

"(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

"(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

"(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

* * *

"(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * *

"(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy."

Rehabilitation Act of 1973, 29 U.S.C. §794 *et seq.*

"Section 794. NONDISCRIMINATION UNDER FEDERAL GRANTS AND PROGRAMS.

"No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

Civil Rights Act of 1871, 42 U.S.C. §1983.

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX D.

United States Constitution, Fourteenth Amendment, Section 1.

> ". . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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FEB 1 1984

No. 83-835

In The

Supreme Court of the United States

OCTOBER TERM, 1983

JOHNSON CITY CENTRAL SCHOOL DISTRICT and CASPER ROHLAND,

Petitioners,

— v. —

BARBARA QUACKENBUSH, for herself and on behalf of her infant son, JASON GAMBEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WESTERN NEW YORK DISABILITY LAW COALITION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 30, 1984.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Western New York Disability Law Coalition (hereinafter "DLC") respectfully moves for leave to file the attached brief *amicus curiae* in opposition to the petition for a writ of certiorari in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the DLC arises from its participation in oral argument and submission of a brief *amicus curiae* in this case in the Second Circuit; furthermore, its members have a strong interest in ensuring the availability of a judicial remedy when handicapped children are denied rights secured to them by the Constitution and by federal statutes.

The DLC is composed of private and public interest attorneys, advocates and organizations who provide representation and assistance to handicapped children and adults in matters affecting their legal rights.[1] DLC members represent plaintiffs in numerous pending cases which raise issues similar to those raised in this case.

In the instant case, counsel for the respondent has indicated that he disagrees with the holding of the Second Circuit and supports granting the petition for a writ of certiorari. *Amicus* will present to this Court reasons for denying the petition which will not be presented by the parties. Thus the arguments in the brief which *amicus* is requesting permission to file, if accepted by this Court, may be dispositive of the petition, and in any case will assist in providing the Court with a full exposition of the issues.

Respectfully submitted,

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January 30, 1984.

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[1]Organizational members of the DLC include: Western New York Protection and Advocacy Office for the Developmentally Disabled, Neighborhood Legal Services, Inc.; Erie County Chapter of the New York State Association for Retarded Citizens, Inc.; Monroe County Coordinating Group on Developmental Disabilities; Statewide Youth Advocacy, Inc.; Mental Health Association of Erie County, Inc.; Southern Tier Legal Services; Greater Upstate Law Project; and State University of New York at Buffalo Law School Legal Assistance Program.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Amicus curiae Western New York Disability Law Coalition respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's decision in this case. That decision is reported at 716 F.2d 141.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the statutes and constitutional provisions which appear in Appendices C and D to the petition, as well as additional sections of 20 U.S.C. § 1415 which were omitted from petitioners' Appendix. The full text of § 1415 is attached hereto as Appendix A.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented at pages 2-5 of the petition, with the following additional observations.

During oral argument of this case in the Court of Appeals, the Court asked counsel for petitioners whether his clients (the Johnson City Central School District and the Chairperson of the District's Committee on the Handicapped, Casper Rohland) had at any time or in any manner informed respondent Quackenbush (hereinafter referred to as "plaintiff") of her right to present a complaint and/or request a hearing regarding her son's special educational needs, as required by 20 U.S.C. § 1415(b). In response to this question, counsel for petitioners (hereinafter referred to as "the school district" or "Rohland") submitted to the Court of Appeals a Stipulation, signed by himself and counsel for plaintiff and dated two days after oral argument, which answered the Court's question in the negative. The Court of Appeals then rendered its decision in the case.

In that decision the Court of Appeals held that the judicial remedy provided to handicapped children and their parents in 20 U.S.C. § 1415(e)(2) is limited by its express terms to parties aggrieved by the findings and decision of an administrative agency after a hearing on a complaint. Plaintiff, having been denied access to this administrative procedure, had no claim under that section. The Court found that by so limiting § 1415(e)(2) Congress clearly intended to preserve a § 1983 remedy for "procedural deprivations whose effect was to prevent a handicapped child from ever reaching the stage of a final administrative determination." PA 15.[2]

The Court held that the complaint stated a cause of action for compensatory damages under § 1983 against the school

[2]References to the Court of Appeals' decision are to pages in the Appendix to the petition.

district "based upon its alleged policy to avoid providing expensive special educational services by preventing handicapped children from gaining access to the procedural safeguards guaranteed by the statute." *Id.* A § 1983 cause of action for compensatory and punitive damages was stated against Rohland, who was alleged to have altered plaintiff's consent-to-evaluation form to indicate that she did not consent to have her son evaluated. The school district could not be held liable for punitive damages.

Finally, the Court of Appeals noted that it was not passing on several other issues which had been addressed by the District Court but were not included in the § 1292(b) certified questions, including: whether damages are available under § 1415(e) (2); whether damages are available under § 504 of the Rehabilitation Act; and whether damages are available under § 1983 for alleged constitutional violations in cases involving the education of handicapped children.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW A NONFINAL JUDGMENT IN A CASE WHICH IS NOT RIPE FOR REVIEW.

This case comes to the Court for review of a denial of a motion to dismiss the complaint. In its present posture, the case simply does not present a question which is ripe for Supreme Court review.

First, the complaint itself was imprecisely drawn to an extent which exacerbated the Court of Appeals' difficulty in rendering a decision. This difficulty was evident from several statements in the Court of Appeals' opinion:

> Although the complaint does not allege what action the school district took on plaintiff's request for special services, we infer that the district took no action whatsoever from that time forward. PA 4.

> We also infer from the allegations that the district took no action on the request because Rowlind [*sic*], without plaintiff's authority, put a check mark on the form . . . . *Id.*
>
> As to the EHA, the district court found sufficient the broad assertion that defendants were on notice that Jason had a handicapping condition but did nothing. PA 6.
>
> As to the Rehabilitation Act, the court stated, inaccurately, that the complaint alleged that Jason had been excluded from the public schools solely because of his learning disability. Actually the complaint does not allege exclusion from the public schools, but only exclusion from "a free and appropriate special education." *Id.*
>
> In short, the district court did not err in refusing to dismiss, because, as we have interpreted the complaint, it sets forth a cause of action against the school district under § 1983 . . . . PA15.

Judge Weis, dissenting in the Court of Appeals, expressed clearly the Court's frustration with the posture of this case:

> It is unfortunate that this case reaches us in a posture where the question of law to be addressed is not as sharply defined as it would have been had the facts been developed more definitively in the district court. In view of the overlapping claims and the vague nature of the plaintiff's complaint, I harbor substantial doubt about the desirability of entertaining a section 1292(b) appeal in this case. PA 25.

Similar concerns militate against this Court granting a writ of certiorari in this case. It is contrary to the general practice of this Court to review a nonfinal judgment, such as one remanding the case to the District Court for trial. ***Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.***, 389 U.S. 327 (1967); ***Cobbledick v. United States***, 309 U.S. 323, 324-325 (1940); ***Hamilton-Brown Shoe Co. v.***

Wolf Bros. & Co., 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893).

In affirming the District Court's denial of the motion to dismiss, the Court of Appeals remanded this case for trial on the merits of the particular claim upheld by the Court, as well as upon a variety of claims not passed upon by the Court. Thus, it has not yet been determined whether or not the plaintiff will prevail, what if any damages will be proven to have resulted from the school district's and Rohland's acts, or upon what legal grounds any damages award will be based.

Furthermore, because a variety of legal claims are asserted in the complaint based on the same nucleus of operative facts, there is considerable uncertainty as to whether the ultimate resolution of this case at trial will turn on the legal issue presented here. The legal claims include: a cause of action pursuant to 42 U.S.C. § 1983 for violation of plaintiffs' rights under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401 *et seq.*, which prevented plaintiffs from gaining access to the administrative and judicial remedies provided for in that statute; a cause of action pursuant to § 1983 for violation of plaintiffs' rights to due process of law and equal protection of the laws; and a cause of action pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, for discrimination on the basis of handicap. The viability of the latter two causes of action may well be affected by this Court's decisions in *Smith v. Robinson*, No. 82-2120, *cert. granted* October 31, 1983, and *Irving Independent School District v. Tatro*, No. 83-558, *cert. granted* December 5, 1983, to be argued and decided this term.[3]

The combination of factors described above clearly indicates that this case is not ripe for review by this Court. There has

[3]In light of the pendency of these related cases, particularly *Smith v. Robinson*, if the Court does not deny the writ of certiorari, it should defer consideration of the petition until *Smith* is decided.

been no trial on the merits to establish what, if any, damages have been suffered as a result of alleged illegal conduct. There has been no judicial determination as to which, if any, legal claims have been substantiated. Decisions in cases already pending in this Court may render the issue in this case even more academic than it is now. And, most importantly, the complaint itself, upon which any action by this Court would be based, is so imprecisely drawn as to obfuscate the factual and legal questions presented.

II. THIS CASE DOES NOT PRESENT THE QUESTIONS WHICH PETITIONERS WISH THIS COURT TO ADDRESS.

Contrary to petitioners' assertion that plaintiff's complaint states an "educational malpractice" claim, seeking damages for misclassification or inappropriate placement of a handicapped child, this case raises no such claim. Indeed, the school district herein never reached the point of determining whether or not plaintiff's son should be classified as handicapped or determining what placement would be appropriate. Rather, as the Court of Appeals stated, plaintiff's "complaint is that through a policy of the school district she was deprived of the opportunity to take advantage of the procedural safeguards offered by the statute." PA 13.

Many of the cases cited in the petition are distinguishable from the instant case in this very respect.[4] Typical of such cases is *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983), in which the plaintiff sought damages for harm alleged to have been caused by an inappropriate placement arrived at through proper use of § 1415 (b)-(c) administrative procedures. Also in this category is *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), relied on so heavily by petitioners. In noting that its decision in the instant case was not inconsistent with *Anderson*,

[4] *All* of the cases cited in the petition are distinguishable on their facts in that none involved a claim for damages based on a school district's failure to afford a handicapped child access to the procedures whereby the child's special educational needs could be determined. Indeed, the illegality alleged in this case — involving, *inter alia*, forgery on a parental consent form — is so unusual as to be virtually *sui generis*.

the Court of Appeals correctly pointed out that *Anderson* involved a plaintiff who had completed the administrative process established by § 1415 (b)-(c), not a plaintiff claiming denial of access to that process. Thus petitioners' asserted conflict among the circuits is more apparent than real.

Finally, the record in this case does not present the first question set forth in the petition.[5] There has not been, and will never be in the context of this case, any showing that education funds have been "diverted" to pay tort damages and attorneys' fees. Furthermore, as previously argued, damages are not sought in this case for errors in classification or placement, but for complete denial of access to the decision-making process.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Amicus Curiae

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[5] If any question is presented in this case, it is:

> Where by school district policy a parent and child are denied information about and prevented from gaining access to the process whereby the child's special educational needs may be determined and met and the process whereby an administrative appeal may be taken from such determination, in violation of the requirements of the Education for All Handicapped Children Act, 20 U.S.C. §§1401 *et seq.*, do the parent and child state a cause of action for damages pursuant to 42 U.S.C. §1983?

However, as noted above, by the time this case is tried to conclusion, this issue very well may not be dispositive.

APPENDIX

APPENDIX A

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to

the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without

regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub. L. 91-230, Title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.